Out on Parol?: A Critical Examination of the Alaska Supreme Court's Application of the Parol Evidence Rule

This note chronicles the imprecision and confusion that has plagued the application of the parol evidence rule in Alaska. By failing to adopt a comprehensible theory under which the rule can be consistently applied by practitioners, the Alaska Supreme Court has further complicated a substantive rule that is inherently perplexing, creating uncertainty regarding when extrinsic evidence is admissible in any particular case. This note begins with an overview of the basics of the parol evidence rule, followed by an analysis of the early development of a restrictive rule in Alaska. Next, the court's transition to a more liberal application is compared to the direct, and thus more effective, approaches employed in California and Arizona. The note concludes with an evaluation of recent attempts at clarification that have given the rule greater impact and a plea to the Alaska Supreme Court to set the parol evidence issue to rest by issuing an exhaustive opinion, at its next opportunity, detailing the court's theoretical stance and explaining how the rule will be consistently applied in the future.

I. INTRODUCTION

Regardless of which state's rule is being examined, any student of the law of contract would describe the parol evidence rule as confusing in its very nature, and Alaska's version of the rule is certainly no exception. Moreover, through its hesitance to explicitly lay down the state of the law at any particular time, the Alaska Supreme Court has done more to muddy the waters further than to illuminate Alaska's treatment of the rule. The result over the years has been frustration on the part of practitioners and confusion within the supreme court itself, culminating in a claim by an advocate before the court in 1989 that the parol evidence rule was "a dead letter in Alaska."[1] This note will attempt to chronicle the rule's development in Alaska and, by drawing parallels to other states, will detail the current state of the law in Alaska, contending

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1. Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist., 778 P.2d 581, 583 (Alaska 1989), *cert. denied*, 493 U.S. 1022 (1990).

that the Alaska Supreme Court is moving in the right direction by giving greater effect to the rule.

II. GENERAL OVERVIEW OF THE PAROL EVIDENCE RULE

A. Definition

The parol evidence rule is a rule of contract interpretation that bars the introduction of extrinsic evidence that would contradict or supplement an integrated written agreement. The rule is not limited to parol, or oral, evidence but extends to all evidence of prior negotiations between contracting parties. As E. Allan Farnsworth notes in his seminal treatise on contracts, it is helpful to think of the rule as one of "prior negotiation" rather than one of "parol evidence."[2] Further, the rule is not one of evidence, through which courts bar a particular method of proving a fact; the parol evidence rule bars the admission of the fact itself and is thus a rule of substantive law.[3] The rationale of the rule is simple: once an agreement has been made and reduced to writing, prior agreements reached during negotiations are superseded by the writing and should not be enforced. Therefore, evidence of prior agreements is not admissible. This general rationale for the parol evidence rule is universally accepted; confusion arises only upon its application.

B. Application

The parol evidence rule is applicable only where the contract at issue is integrated—that is, where the parties intended the contract to be a final and complete expression of their agreement.[4] There are two forms of integration, complete and partial. When a contract is found to be completely integrated, evidence of prior agreements presented to contradict the contract terms is not allowed. When a contract is only partially integrated, however, evidence of prior agreements that supplements, but does not contradict, the writing is admissible.[5] The theoretical dispute surrounding the parol evidence rule revolves around this primary question of integration.

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2. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.2, at 193-94 (1990).
3. *Id.* at 194.
4. *Id.* § 7.3, at 198.
5. *Id.*

The determination of integration is based upon the intention of the parties. If a writing appears to be thorough and complete, then a court is likely to find integration, but most courts will allow evidence to be presented to show that the parties did not so intend.[6] Once integration is found, it must be determined whether the contract is completely or partially integrated. Again, the question is one of intention: did the parties intend the contract to be the final expression of their entire agreement, complete integration, or did they simply intend it to be a final expression of the terms contained in the writing, partial integration?[7]

Under the traditional, restrictive view of contract interpretation, supported primarily by Professor Williston, if a writing appears on its face to be a complete expression of the agreement, then the court should not look beyond the document and should find the contract to be completely integrated.[8] Professor Corbin, however, representing the modern, liberal approach to the parol evidence rule, contends that all relevant circumstances should be taken into account when determining integration, including evidence of prior negotiations.[9] The trend among the states has been to adopt the Corbin approach.[10]

Because the determination of integration depends upon the intention of the parties involved, it would seem to be a question for the trier of fact. In most courts, however, the integration issue is resolved by the trial judge as a matter of law.[11] After the preliminary finding of partial or complete integration, the court turns to interpreting the language that makes up the agreement. All courts agree that where such language is vague or ambiguous, the parol evidence rule permits evidence of surrounding circumstances to be introduced, including evidence of prior negotiations, to resolve any ambiguity.[12] A conflict occurs between the traditional and liberal views, however, where the language of the agreement appears to be clear or unambiguous on its face.

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6. *Id.* at 200.
7. *Id.* at 202.
8. *Id.*
9. *Id.* at 203.
10. *Id.* at 203-04 (collecting cases).
11. *Id.* at 209.
12. *Id.* § 7.12, at 269.

III. THE TRADITIONAL, WILLISTON APPROACH

A. The Basics of the Williston Approach

Under the traditional, or "plain meaning," approach, which was championed by Professor Williston and incorporated in the first Restatement of Contracts,[13] evidence of prior negotiations is admitted only where an ambiguity can be found in the document.[14] This view is sometimes mistakenly referred to as the "four corners" approach, meaning that, where no ambiguity exists, the court, in interpreting a contract term, will refer only to evidence found within the "four corners" of the document.[15] The four corners approach is more restrictive than plain meaning, which allows evidence of surrounding circumstances, but not of prior negotiations.[16]

Where the traditional view is employed, determination of admissibility under the parol evidence rule ordinarily involves a two-step process. First, the court decides whether the contract language is ambiguous as a matter of law. If ambiguity is found to exist, the court then allows evidence of prior negotiations to resolve the ambiguity.[17] By framing the first step as a question of law, courts following the traditional approach allow for judicial review of the decision regarding ambiguity and thus foster consistency within a jurisdiction. The traditional approach also conserves judicial resources by tolerating only limited litigation on questions of interpretation where the meaning of a document appears to be clear.[18] The Alaska Supreme Court's initial application of the parol evidence rule followed the traditional approach.[19]

B. Early Confusion in Alaska

The confusion surrounding the development of case law in Alaska concerning the application of the parol evidence rule began as early as the 1960's. Although the court made it clear that extrinsic evidence of prior negotiations would be allowed where

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13. RESTATEMENT (FIRST) OF CONTRACTS § 230 & cmt. a (1932).
14. FARNSWORTH, *supra* note 2, at 270.
15. *Id.* at 271 n.8.
16. *Id.*
17. *Id.* at 271.
18. *Id.*
19. *See infra* part III.B.

ambiguity was found, in the latter half of the decade its decisions reflected inconsistency as to whether Alaska employed the traditional or liberal approach when a document appeared to be clear on its face. In 1965, for example, in *Pepsi Cola Bottling Co. of Anchorage v. New Hampshire Insurance Co.*,[20] the court invoked the four corners approach and held that where an insurance policy is clear and unambiguous on its face, the parties' intent must be ascertained from the document itself.[21] Three years later in *Port Valdez Co. v. City of Valdez*,[22] the court extended the four corners approach to non-insurance cases.[23] Only one year later, however, without any explanation, the court reversed its position when it held in *Alaska Placer Co. v. Lee*[24] that words can never be completely unambiguous and summarily dismissed the traditional ambiguity requirement, stating:

> [I]t is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the "surrounding circumstances," including the persons, objects, and events to which the words can be applied and which caused the words to be used.[25]

Five years after *Alaska Placer*, the court finally acknowledged in *Day v. A & G Construction Co.*[26] that there was a "possibility of some confusion"[27] arising out of its positions in prior cases.[28] Nevertheless, the *Day* court decided not to resolve this confusion because the only question at issue in that case was whether a particular phrase was ambiguous.[29] If Alaska did not require a finding of ambiguity for parol evidence to be admitted, however, as was held in *Alaska Placer*, then the question of whether "a portion

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20. 407 P.2d 1009 (Alaska 1965).
21. *Id.* at 1013.
22. 437 P.2d 768 (Alaska 1968).
23. *Id.* at 771-72.
24. 455 P.2d 218 (Alaska 1969).
25. *Id.* at 221 (quoting 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 536, at 28 (1960)). The court held that meaning was not so clear as to bar extrinsic evidence as to the intentions of the parties. *Id.*
26. 528 P.2d 440 (Alaska 1974).
27. *Id.* at 443 n.4.
28. *See* Robert C. Erwin, *Parol Evidence or Not Parol Evidence in Alaska*, 8 ALASKA L.J. 20 (1970).
29. *See Day*, 528 P.2d at 444 n.4.

of the contract at issue is ambiguous"[30] should have been of no concern. Thus, the issue of whether the parol evidence rule requires a finding of ambiguity certainly could have, and should have, been addressed in *Day*. The court's failure to resolve these inconsistencies when presented with an opportunity to do so foreshadowed the future inconsistencies and the resulting confusion among practitioners that would plague the court for decades.

C. The Establishment of the Traditional Rule

Finally, in 1976, the Alaska Supreme Court took a firm stand and embraced the traditional version of the parol evidence rule, temporarily ending the confusion. In *National Bank of Alaska v. J. B. L. & K. of Alaska, Inc.*,[31] the trial court refused to admit extrinsic evidence regarding the parties' intentions under a covenant not to compete included in a contract finalizing the sale of an insurance business. National Bank contended that the covenant was ambiguous and that parol evidence relating to the parties' intent should have been admitted. Holding that a finding of ambiguity was required in Alaska before parol evidence could be admitted, the supreme court found the disputed evidence unambiguous and affirmed the trial court.

The court first assumed that the trial court had found the contract to be integrated because the court had treated it as such and because neither party had disputed the fact.[32] With integration, extrinsic evidence could not be admitted to add to or vary the agreement, leaving the document as the sole subject of interpretation.[33] In interpreting such a contract, however, the court was not limited to a mere inspection of the document.[34] Instead, a two-step approach was employed. The first step was to determine whether an ambiguity existed, considering all of the surrounding circumstances. "'Only after a careful and painstaking search of all the factors shedding light on the intent of the parties'"[35] could a court make this determination. If the document was found to be

30. *Id.*

31. 546 P.2d 579 (Alaska 1976).

32. *Id.* at 583 n.7.

33. *Id.* at 583 (citing 3 S. WILLISTON, THE LAW OF CONTRACTS § 603 (1961)).

34. *Id.* at 585. Although invoking the traditional view, the court decided upon the plain meaning approach rather than the four corners approach. *See supra* note 15 and accompanying text.

35. *Id.* (quoting 3 S. WILLISTON, THE LAW OF CONTRACTS § 600A (1961)).

clear and unambiguous, then the court would confine itself to the document in interpreting the parties' intent. If ambiguity was found, however, then evidence of the surrounding circumstances could be further consulted to resolve the question of intent.[36] Thus, with *National Bank*, the traditional approach to the parol evidence rule seemed to be firmly in place in Alaska.

D. The Progression Towards the Liberal Approach

Within a year of *National Bank*, however, the court began to hint at a desire to stray from its newly adopted position. The Alaska Supreme Court's decision in *Wessells v. State, Department of Highways*[37] affirmed *National Bank*, further explaining the two-step analysis employed in parol evidence rule cases. In describing the first stage, the court held that ambiguity would not be found to exist simply because two parties disagreed as to how the contract should be construed. Ambiguity existed only where the terms in dispute were "reasonably subject to differing interpretation after viewing the contract as a whole and the extrinsic evidence surrounding the disputed terms."[38] Thus, *Wessells* appeared, at the time, to be a continuation of an explicit, traditional approach to applying the parol evidence rule, providing a well-settled approach with which trial courts and practitioners could become comfortable. Unfortunately the seeds of dissension, which would eventually alter the parol evidence rule in Alaska, were sewn into *Wessells* itself.

Although it likely seemed of minor importance at the time, footnote thirty-nine of the *Wessells* opinion can be seen as the beginning of Alaska's move to the liberal approach to the parol evidence rule. In that footnote, following the final word of the opinion, Chief Justice Boochever and Justice Rabinowitz exhibited support for Professor Corbin's liberal approach, which would allow admission of extrinsic evidence in all cases to determine the reasonable expectations of the parties.[39] They suggested that the two-tiered approach, which the court employed in *Wessells*, was "unduly cumbersome" and offered minimal advantage over an approach that considered extrinsic evidence initially[40] and, thus,

36. *Id.* at 584.
37. 562 P.2d 1042 (Alaska 1977).
38. *Id.* at 1046 (citing, *inter alia*, *National Bank*, 546 P.2d at 584-86).
39. *Id.* at 1052 n.39.
40. *Id.*

recommended that the court dispense with the requirement of an initial finding of ambiguity.[41]

In *Tsakres v. Owens*,[42] an opinion delivered just two days after *Wessells*, the majority of the court again confirmed that the traditional two-tiered approach was the standard in Alaska, outlining that approach and reaffirming the definition of ambiguity espoused in *Wessells*.[43] The *Tsakres* opinion explicitly stated that without a finding of ambiguity, "the prerequisite for admissibility of parol evidence is lacking."[44] In a concurrence, however, Chief Justice Boochever and Justice Rabinowitz, citing footnote thirty-nine of the *Wessells* opinion, affirmed their opposition to the ambiguity requirement and again criticized the two-tiered approach.[45]

At this point, a stark theoretical disagreement existed among the justices on the Alaska Supreme Court. Three members in *Wessells* and *Tsakres*—Justices Connor, Erwin, and Burke—supported Williston's traditional approach. Two members—Chief Justice Boochever and Justice Rabinowitz—explicitly declared their allegiance to Corbin's approach to the rule. Thus, after *Tsakres*, the parol evidence rule in Alaska was again in a state of uncertainty. Because the application of the rule could change drastically with the swing of a single vote, apprehension as to its status was likely great.

In fact, it is probable that the initial confusion surrounding the rule had never totally abated. At the time of the splintering in *Tsakres* and *Wessells*, an explicit parol evidence rule had only been in place for fifteen months. The result of such instability would be frustration among Alaska's practitioners of contract law and within its trial courts. It would be impossible to utilize the parol evidence

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41. *Id.*

42. 561 P.2d 1218 (Alaska 1977).

43. *Id.* at 1221-22 (citing *Wessells*, 562 P.2d at 1046).

44. *Id.* at 1221. The court in *Tsakres* also held that the interpretation of words is a question of law to be determined by the court, although resolution of a dispute about surrounding circumstances is a matter for the trier of fact. Because questions of meaning are for the court, higher courts are not bound by the trial court's views, and the "clearly erroneous" standard that applies to findings of fact is inapplicable. *Id.* at 1222. With the eventual shift to the liberal approach, which dismisses the initial finding of ambiguity as a matter of law, this "clearly erroneous" standard becomes vital, as higher courts are more often required to defer to the judgment of the trial court.

45. *Id.* at 1223 (Boochever, C.J., concurring).

mechanism effectively when the application of the rule was subject to change with virtually every supreme court case.

IV. THE LIBERAL, CORBIN APPROACH

A. The Basics of the Corbin Approach

As noted by Chief Justice Boochever and Justice Rabinowitz in the *Wessells* footnote, under Professor Corbin's approach to the parol evidence rule, evidence of surrounding circumstances should always be admitted to determine the intention of the parties.[46] No finding of ambiguity is required. Even under this liberal view, however, parol evidence that contradicts the writing will not be admitted. A court must still determine whether evidence is proffered for purposes of interpretation or contradiction. Thus, even under the liberal view, extrinsic evidence is admissible only where the question is one of ambiguity or vagueness, as interpretation deals with problems that "derive from the failure of language."[47]

The principal advantage of the liberal approach is that it seeks to minimize the inherent ambiguity of all language by introducing evidence of relevant surrounding circumstances. Admitting such extrinsic evidence will better allow the court to determine the expectations of the parties[48] and, thereby, effectuate the purpose of contract interpretation, enforcing the agreement to which the parties intended to be bound. Nationally, the trend has been toward adopting this liberal approach.[49]

B. Trends Toward the Corbin Approach

As with many theoretical movements in American jurisprudence, the first state to switch to the liberal approach to the parol evidence rule was California, which made the jump in the late 1960's. Arizona followed the trend more recently, in the early 1980's. Both of these states instituted an approach similar to that suggested by Chief Justice Boochever and Justice Rabinowitz, who would eventually succeed in swaying the Alaska court toward

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46. *See* Wessells v. State Dep't of Highways, 562 P.2d 1042, 1052 n.39 (Alaska 1977); *see also* FARNSWORTH, *supra* note 2, § 7.12, at 272.

47. *Id.* at 273.

48. *Id.* at 277-78.

49. *Id.* § 7.3, at 203-04 (collecting cases).

adopting their views. Contrary to what would eventually occur in Alaska, however, the court in California, realizing that a theoretical change would drastically impact the manner in which contract law would be practiced, was explicit in stating that a major theoretical change was occurring and was precise in explaining the practical effects of such a change.

1. *California.* The California Supreme Court, led by Chief Justice Roger Traynor, discarded the traditional parol evidence rule in a series of opinions handed down in 1968.[50] The move began slowly in *Masterson v. Sine*,[51] where the court found that, although the state had indicated compliance with the traditional rule, such "strict formulations" had not been applied consistently.[52] In holding that parol evidence of collateral agreements should be excluded only where the jury may be misled easily, the court embraced the Corbin approach. The *Masterson* opinion drew a vigorous dissent maintaining that the parol evidence rule was being abrogated. The dissent argued that by admitting parol evidence to vary a contract that appeared clear on its face, the court "lessens the reliance which may be placed upon written instruments."[53]

Nevertheless, the California court continued on its path toward liberalizing the parol evidence rule shortly thereafter in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*,[54] a frequently cited case in support of the Corbin approach. In *Pacific Gas*, the California court set out the rule to be followed in all subsequent cases and explained the theoretical reasoning behind the change. The court stated that the intention of the parties to a contract can never be determined by mere examination of the words of a document.[55] Even where courts purport to invoke the four corners rule, meaning is necessarily determined according to "extrinsic evidence of the judge's own linguistic education and experience."[56] The court implied that perfect verbal expression is never possible, and, therefore, deference to a judge's facial

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50. *See generally* Olivia W. Karlin & Louis W. Karlin, *The California Parol Evidence Rule*, 21 SW. U. L. REV. 1361 (1992).

51. 436 P.2d 561 (Cal. 1968).

52. *Id.* at 563.

53. *Id.* at 567 (Burke, J., dissenting).

54. 442 P.2d 641 (Cal. 1968).

55. *Id.* at 644-45.

56. *Id.* at 643 (citing 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 579, at 225 n.56 (Supp. 1964)).

interpretation of a contract's terms, without allowing testimony of surrounding circumstances to contradict his conclusions, severely limits the court's ability to determine the true intention of the parties.[57]

Thus, in determining whether extrinsic evidence should be admissible for purposes of interpretation, the court should not look at whether the document appears to be clear and unambiguous on its face, but rather at "whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."[58] The court recognized that extrinsic evidence cannot be admitted to add to, contradict or vary a written contract but reasoned that the meaning of the terms must first be determined before a court can decide if the evidence is being introduced for a prohibited purpose.[59] To determine the intention of the parties, a court must consider all credible evidence offered for that purpose. By considering all the circumstances surrounding contract formation, a court is able to place itself in the situation of the parties.[60] In light of these circumstances, if the contract language is "fairly susceptible" to either of the offered explanations, then extrinsic evidence to prove either of such meanings is admissible.[61] Later in 1968, *Pacific Gas* was affirmed in *Delta Dynamics, Inc. v. Arioto*,[62] confirming that the liberal approach to the parol evidence rule was firmly established in California.

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57. *Id.* at 644-45.

58. *Id.* at 644. This "reasonably susceptible" test would become the cornerstone of the liberal approach to the parol evidence rule. *See* RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. b (1979); *infra* note 106 and accompanying text.

59. *Pacific Gas & Electric*, 442 P.2d at 645.

60. *Id.* (citations omitted).

61. *Id.* at 646 (citations omitted). The court noted that under the traditional rule such evidence would be admissible "on the stated ground that the contract was ambiguous." *Id.* at 646 n.8. The court claimed that the old rule "is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning." *Id.* Under the traditional approach, ambiguity is established, not merely because two parties disagree, but because the court finds the language "reasonably subject to differing interpretation." *See supra* text accompanying note 38. Although the difference is subtle, the traditional approach requires a higher level of susceptibility before extrinsic evidence will be admitted.

62. 446 P.2d 785 (Cal. 1968).

2. *Arizona.* In the early 1980's, the Arizona Supreme Court also adopted the liberal approach to the parol evidence rule,[63] though not in as explicit a fashion as did California. In *Smith v. Melson, Inc.*,[64] the court held that a contract should be interpreted with regard to the surrounding circumstances so as to determine the parties' intentions and that such circumstances may always be considered by the court.[65] The court further held that the contract at issue was unambiguous, granting the appellant's request for specific performance based upon the plain meaning of the contract language.[66]

Although this holding seems consistent with the traditional approach to the parol evidence rule,[67] the court would hold one year later, in *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*,[68] that the *Smith* decision signified the adoption of the Corbin view in Arizona.[69] In *Darner*, the court cited *Smith* for the proposition that because interpretation of an agreement is not limited to the words of the document alone, evidence of all surrounding circumstances, including prior negotiations, should be admitted.[70] Thus, Arizona switched to the liberal version of the parol evidence rule without having ever previously held that a change had taken place.[71]

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63. *See* Robert L. Gottsfield, Darner Motor Sales v. Universal Underwriters: *Corbin, Williston and the Continued Viability of the Parol Evidence Rule in Arizona*, 25 ARIZ. ST. L.J. 377 (1993) (stating that Arizona had adopted Corbin's liberal approach, requiring that the court "stand in the shoes of the contracting parties").

64. 659 P.2d 1264 (Ariz. 1983).

65. *Id.* at 1266-67 (citing RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981) and JOHN E. MURRAY, MURRAY ON CONTRACTS § 108 (1974)).

66. *Id.*

67. The holding is most notably consistent with the explicit finding that the contract was unambiguous.

68. 682 P.2d 388 (Ariz. 1984).

69. *Id.* at 398.

70. *Id.*

71. The actual holding of the *Darner* court was that the liberal approach, which it claimed to have been established in *Smith,* would be extended to boilerplate insurance contracts, because it would be "anomalous" to follow the liberal approach for bargained for contracts but employ the traditional approach for standardized form contracts. *Id.* Thus, the court simply seized an opportunity to change the rule as soon as one arguably presented itself. Interestingly, in 1991, the Alaska Supreme Court adopted the reasoning in *Darner* and applied it to standard form contracts even outside the insurance context. *See* Lauvetz v. Alaska Sales &

The Arizona Supreme Court recently clarified its position in *Taylor v. State Farm Mutual Automobile Insurance Co.*[72] with a complete discussion of the state of Arizona's parol evidence rule. The Arizona Court of Appeals in *Taylor* had applied the "four corners" approach to the agreement, finding that it was not ambiguous and that the trial judge had erred by admitting parol evidence to vary its terms.[73] Such confusion as to the state of the law in Arizona forced the supreme court to discuss the parol evidence rule at length. After briefly discussing the basics of both the traditional and liberal approaches, the court held that, because the main purpose of contract interpretation in Arizona is to recognize the intentions of the parties, extrinsic evidence should be admitted without any preliminary finding of ambiguity.[74]

Reaffirming the notion that *Smith v. Melson, Inc.*, had adopted the Corbin view, the court outlined the two steps to be followed in contract interpretation under that approach. First, a court must examine evidence that bears upon the extent of integration, illuminates the meaning of the contract language or demonstrates the intent of the parties.[75] If evidence offered contradicts or varies the language of the document, rather than aiding in its interpretation, the court may disallow its admission.[76] The court then "finalizes" its understanding of the document, and it is at this point that the parol evidence rule applies to exclude extrinsic evidence that would contradict or vary the meaning of the written words as determined by the court.[77]

In carrying out the first step described above, Arizona courts are to apply the "reasonably susceptible" test as developed in California's *Pacific Gas* decision.[78] Although acknowledging criticism of *Pacific Gas*,[79] the court held that the rule established

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Serv., 828 P.2d 162, 165 (Alaska 1991).

72. 854 P.2d 1134 (Ariz. 1993).

73. *Id.* at 1137.

74. *Id.* at 1138.

75. *Id.* at 1139.

76. *Id.* For admission to be barred, however, the offered interpretation should be "so unreasonable or extraordinary that it is improbable." *Id.*

77. *Id.*

78. *Id.* at 1140.

79. *Id.* at 1140 n.2. The court especially addressed the concerns of Judge Alex Kozinski of the Ninth Circuit Court of Appeals, who vocally opposes the liberal approach. *See* Wilson Arlington Co. v. Prudential Ins. Co. of Am., 912 F.2d 366, 370 (9th Cir. 1990) ("If parties to an agreement could not rely on written words

there correctly stated the Corbin view that parol evidence should be excluded only if it contradicts or varies the written agreement.[80] To determine whether exclusion is proper, a court must first decide what the agreement means and if it could reasonably be interpreted in different ways given the surrounding circumstances at the time of contract formation.[81] The more improbable the interpretation offered, the more convincing the evidence must be before the contract can be adjudged "reasonably susceptible" to that meaning.[82] Such an adjudication is a question of law for the court.[83]

C. Alaska's Switch to the Liberal Approach

Alaska's eventual movement to the liberal approach was a furtive effort, similar to that made by the Arizona court in that no case ever explicitly stated that a theoretical adjustment in the application of the parol evidence rule was being made. In 1977, a minority of the Alaska Supreme Court supported such a move to the Corbin approach, and, as the composition of the court changed over the next few years, the position of Chief Justice Boochever and Justice Rabinowitz gained majority approval.[84] Unfortunately, the court has never issued an opinion overruling the traditional approach, as the California court did in *Pacific Gas*,[85] nor has it ever remedied this omission as the Arizona court did in *Taylor*.[86]

The first sign that a majority in Alaska had adopted the liberal approach came in *Wright v. Vickaryous*.[87] In a footnote to the *Wright* opinion, the court proclaimed that Alaska had "moved away from the cumbersome two-step process"[88] that had required a

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to express their consent to the express terms of that agreement, those words would become little more than sideshows in a circus of self-serving declarations as to what the parties to the agreement really had in mind."); Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988) ("While [the liberal view of the rule] creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts.").

80. *Taylor*, 854 P.2d at 1140 n.2.
81. *Id.*
82. *Id.* at 1141.
83. *Id.* at 1144-45.
84. *See supra* notes 37-45 and accompanying text.
85. 442 P.2d 641 (Cal. 1968); *see supra* notes 50-62 and accompanying text.
86. 854 P.2d 1134 (Ariz. 1993); *see supra* notes 63-83 and accompanying text.
87. 598 P.2d 490 (Alaska 1979).
88. *Id.* at 497 n.22.

preliminary finding of ambiguity before extrinsic evidence would be admitted. In support of this proposition, the court cited Chief Justice Boochever's concurrence in *Tsakres* and the court's opinion in *Stordahl v. Government Employees Insurance Co.*[89]

Neither of these cases, however, lend much support to the contention that Alaska had previously abandoned the traditional approach. In *Tsakres*, the court's opinion actually *employed* the two-step analysis dismissed by the *Wright* court, holding that a finding of ambiguity is necessary for extrinsic evidence to be admissible in contract interpretation under Alaska law.[90] Though Chief Justice Boochever's concurrence in *Tsakres* discussed his and Justice Rabinowitz's support for the liberal approach, it provides little authority for the proposition that Alaska had adopted the liberal position. That such an opinion was expressed separately from the majority decision indicates precisely the opposite, that the court had not previously accepted the liberal view.

The *Stordahl* decision, which followed *Tsakres*, was also misinterpreted by the court in *Wright*. Rather than acknowledging that Alaska had "moved away from the two-step process," *Stordahl* confirmed the continuing viability of the traditional approach by creating an explicit exception to the two-tiered test in the insurance context. The court found that due to the inequality of bargaining power in the case of insurance contracts, their interpretation must be controlled by "somewhat different standards" than those applied to other contracts.[91] Thus, where the court is dealing with an insurance contract, ambiguity need not be found for the court to admit extrinsic evidence bearing upon the reasonable expectations of the parties.[92] The court, "[k]eeping in mind the special considerations applicable to insurance contracts," then employed the method set out in the *Wessells* footnote and the *Tsakres* concurrence.[93]

Upon examination of their holdings, neither the *Tsakres* nor the *Stordahl* opinion lends support to the assertion by the *Wright* court that Alaska had previously abandoned the two-step rule requiring an initial finding of ambiguity. The court, nevertheless, elevated the *Wright* footnote to accepted status with its decision in

89. 564 P.2d 63 (Alaska 1977).
90. *See* Tsakres v. Owens, 561 P.2d 1218, 1221-22 (Alaska 1977).
91. *Stordahl*, 564 P.2d at 65.
92. *Id.* at 66.
93. *Id.*

Peterson v. Wirum,[94] citing the footnote for the proposition that extrinsic evidence as to the intent of the parties is admissible without any prerequisite finding of ambiguity.[95] The court stated that the object of contract interpretation was "to give effect to the reasonable expectations of the parties."[96] To ascertain these expectations, courts must look to relevant extrinsic evidence as well as to the contract language.[97]

The reasons for these unsupported assertions in *Wright* and *Peterson* are unclear, just as the state of the law regarding application of the parol evidence rule must have been at the time. Had the court simply issued an opinion explaining that the traditional approach was being overruled and the liberal rule adopted, confusion could have been avoided in ensuing years. By not doing so, however, the parol evidence rule remained in a state of flux, with no clear rule of law explicitly laid down to which either the lower courts or Alaska practitioners could refer.

Upon reflection today, it is clear that by the time of the *Peterson* decision, the Alaska Supreme Court had implicitly overruled *National Bank of Alaska*, which had established the two-step test. In fact, judging by the court's application of the parol evidence rule, the liberal approach was in place with the *Wright* decision, but the court did not *hold* that such a change had occurred until its decision in *Alyeska Pipeline Service Co. v. O'Kelley*.[98] In *O'Kelley*, the court stated, again in a footnote to the opinion, that the two-tiered test had been "criticized" and held that extrinsic evidence may be consulted without any requirement of an initial finding of ambiguity.[99] Thus, the liberal approach to the parol evidence rule was officially in place in Alaska.

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94. 625 P.2d 866 (Alaska 1981).

95. *Id.* at 871-72 n.9 (citing Wright v. Vickaryous, 598 P.2d 490, 497 n.22 (Alaska 1979)). The court in *Peterson* also addressed the "clearly erroneous" standard, *see supra* note 44, holding that where extrinsic evidence is not in dispute, the court is not limited by that standard in its review of lower court decisions. In these cases, contract interpretation is treated as a matter of law. *Peterson*, 625 P.2d at 871-72.

96. *Id.* at 872 n.10.

97. *Id.* Although the court cited *Wright* for this proposition, this concept was originally enunciated by the court in *Stordahl*, which dealt exclusively with the interpretation of insurance contracts. *See Stordahl*, 564 P.2d at 66.

98. 645 P.2d 767 (Alaska 1982).

99. *Id.* at 771 n.1.

V. THE CURRENT STATE OF THE PAROL EVIDENCE RULE

A. *Alaska Northern*: The Alaska Supreme Court Cedes Reviewing Authority

In 1983, the Alaska Supreme Court finally made an effort to provide a detailed explanation of the state of the parol evidence rule. In *Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.*,[100] the court reviewed the superior court's application of the parol evidence rule to bar introduction of extrinsic evidence that would have limited the scope of the Alyeska management committee's power to approve a sale of surplus parts. For the lower court to bar evidence regarding the existence of additional terms not explicitly found in the contract, the court held that a two-step determination must be made.[101]

The first step asks whether the document represents an integrated agreement. A finding of integration depends upon whether the parties intended the writing to be a final expression of one or more terms of the agreement.[102] Such a finding was to be made by the court as a question of fact, taking into consideration all relevant evidence, including that of surrounding circumstances.[103] The parol evidence rule applies only to integrated portions of the agreement.

Second, the court determines whether the proffered evidence of "a prior or contemporaneous agreement contradicts or is inconsistent with the integrated portions [of the contract]."[104] For this purpose, inconsistency is defined as "the absence of reasonable harmony in terms of the language and respective obligations of the parties."[105] If contradiction or inconsistency exists, the parol

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100. 666 P.2d 33 (Alaska 1983), *cert. denied*, 464 U.S. 1041 (1984).

101. *Id.* at 37.

102. *Id.*

103. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c (1979)).

104. *Id.*

105. *Id.* at 40 (quoting Snyder v. Herbert Greenbaum & Assoc., Inc., 380 A.2d 618, 623 (Md. 1977)). In adopting this definition of inconsistency, the court rejected a definition, proposed by Alaska Development, that would have been more lenient in the admission of extrinsic evidence. Alaska Development proposed that the court adopt New York's definition that "the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable." *Id.* (quoting Hunt Foods & Indus., Inc. v. Doliner, 270 N.Y.S.2d 937, 940 (N.Y. App. Div. 1966)).

evidence rule bars admission of such extrinsic evidence. According to the court, this determination often cannot be made from the face of the writing. Where reasonable people could differ as to the interpretation of the disputed terms, the choice between reasonable inferences should be treated as a question of fact, but where the proposed meaning is not one to which the language is "reasonably susceptible," the meaning is established by the court as a matter of law.[106] The court also held that even if the evidence is consistent with the writing, it could still be barred if the court finds that the writing would have included the term if it was intended to be part of the agreement.[107]

Thus, *Alaska Northern* finally provided an explicit definition of the parol evidence rule in Alaska, at least for those cases where a party wished to offer evidence of additional terms. The rule established by the court is consistent with the approach championed by Corbin in the Second Restatement of Contracts and adopted by California and Arizona, as well as several other states.[108] Nevertheless, *Alaska Northern* did not alleviate the difficulty that the parol evidence rule had created in Alaska; it merely diverted the confusion in another direction.

B. Problems with the New Rule

The decision in *Alaska Northern* proclaimed that both the initial finding of integration and the decision regarding which "reasonable" interpretation would be employed were questions for the finder of fact, not questions of law. Thus, the only aspect of parol evidence decisions that would not be subject to the "clearly erroneous" standard[109] upon appellate review was whether the

106. *Id.* at 39 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. b (1979)).

107. *Id.* at 37.

108. *See, e.g.*, Admiral Builders Sav. & Loan Ass'n v. South River Landing, Inc., 502 A.2d 1096, 1098-1100 (Md. Ct. Spec. App. 1986); Bryan v. Vaughn, 579 S.W.2d 177, 181-82 (Mo. Ct. App. 1979).

109. It is a general principle of legal procedure that trial court factual findings will only be overturned if the reviewing court determines them to be clearly erroneous. ALASKA R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.") Such deference is given to findings of fact because the trial court is in the best position to view the disputed evidence. Associated Eng'rs & Contractors, Inc. v. H. & W. Constr. Co., 438 P.2d 224 (Alaska 1968) (holding that judging the credibility of witnesses and weighing

language was "reasonably susceptible" to more than one interpretation. By framing the issues so narrowly, the Alaska Supreme Court limited its authority in parol evidence cases, deferring the decision regarding the admission of extrinsic evidence to the trial court.

The difficulty inherent in such an approach was borne out in cases following *Alaska Northern.* In *Kennedy Associates v. Fischer,*[110] for example, the Alaska Supreme Court held that although the court will exercise its independent judgment where the interpretation of a contract is based solely upon documentary evidence, the "clearly erroneous" standard must be applied where extrinsic evidence has been admitted and relied upon by the trial court.[111] Although *Kennedy Associates* did not involve an integrated contract and, thus, was not a parol evidence rule case, the same philosophy was employed in parol evidence cases. In *Norton v. Herron,*[112] for example, the court held that the "clearly erroneous" standard is to be applied whenever extrinsic evidence admitted by the trial court is in dispute.[113] When such evidence is not in dispute, however, the interpretation question becomes one of law.[114] Thus, the availability of appellate review turns on whether admitted extrinsic evidence is disputed at trial. This distinction was affirmed in *Fairbanks North Star Borough v. Tundra Tours,*[115] where the court held that "[b]ecause extrinsic evidence was presented at trial regarding interpretation of the parties' agreement, we are confined to determining whether the facts support the trial court's interpretation. We will not reverse the trial court's factual findings . . . unless they are clearly erroneous."[116]

By admitting extrinsic evidence where a contract term is merely "reasonably susceptible" to a proposed interpretation, the trial court exposed itself to a litany of factual disputes. Because the findings of fact that emerge from these disputes can be overturned only where "clearly erroneous," the Alaska Supreme Court left the application of the parol evidence rule in the hands of the trial

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conflicting evidence is a function of the trial court).

110. 667 P.2d 174 (Alaska 1983).

111. *Id.* at 179.

112. 677 P.2d 877 (Alaska 1984).

113. *Id.* at 880.

114. *Id.*

115. 719 P.2d 1020 (Alaska 1986).

116. *Id.* at 1025 (citations omitted).

courts. Far from simplifying the process, this approach promoted inconsistency among courts in their application of the rule.[117] This established confusion among practitioners, as parol evidence determinations could vary depending on the trial judge before whom they appeared.[118]

Under the previously employed two-tiered test described in *National Bank of Alaska*,[119] such difficulties were much less likely to occur because the finding of ambiguity as a matter of law was more stringent than the "reasonably susceptible" approach. Thus, the supreme court would be able to justify a reversal of an incorrect factual finding regarding the meaning of a term by overturning the trial court's decision as to ambiguity. A "reasonably susceptible" finding by the trial court erects a more formidable barrier to intervention by a reviewing court. Indeed, the utter lack of any cases in which the Alaska Supreme Court reversed a "reasonably susceptible" finding substantiates the claim that the power in these cases rested in the hands of the trial court.

C. *Lower Kuskokwim II*: The Alaska Supreme Court Moves Toward Regaining Control

In light of the cases following *Alaska Northern*, where virtually all extrinsic evidence was admissible under the "reasonably susceptible" standard and the Alaska Supreme Court was virtually powerless to review the lower court's decisions allowing such evidence, it is no wonder that it was argued before the Alaska Supreme Court that the parol evidence rule was a "dead letter" in *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim School*

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117. Because the findings of trial courts are largely unreviewable, the Alaska Supreme Court is unable to reconcile inconsistent holdings to create a coherent body of parol evidence case law.

118. This is not to suggest that the jury should have no place in disputes involving the parol evidence rule, but rather that the threshold legal determination of whether a question of fact exists regarding the meaning of a term should be a more formidable one than existed in Alaska under *Alaska Northern*. The uniformity called for here is uniformity in the application of the parol evidence rule in general, not in the ultimate decision of a particular case. It is desirable that the admissibility of a particular piece of evidence be the same throughout the jurisdiction. Admissibility of parol evidence, therefore, should be evaluated as a question of law, subject to appellate review, regardless of the theoretical position of the court.

119. 546 P.2d 579 (Alaska 1976).

District.[120] The rule made a practical comeback in this case, which had found its way back to the supreme court after remand from *Lower Kuskokwim School District v. Alaska Diversified Contractors, Inc.*[121] The contract at issue there called for a construction project to be completed by a specific date.[122] Alaska Diversified, however, presented evidence that in prior negotiations the parties had agreed to allow completion up to eleven months later and that this was the reason for only nominal liquidated damages being provided for under the contract during this period.[123]

In *Lower Kuskokwim I*, the supreme court regained some of the power it had relinquished to the lower courts. First, the court held that even though the trial court made no ruling on integration, it could find the document to be completely integrated because the question of integration is a question of law for the court to decide.[124] This position, however, conflicted with the one taken in *Alaska Northern*, which the *Lower Kuskokwim I* court cited,[125] where the court had held that "[w]hether a writing is integrated is a question of fact to be determined by the court in accordance with all relevant evidence."[126] Thus, the court misapplied *Alaska Northern* and, in so doing, created a reviewable question of law on the integration issue.

Later in the *Lower Kuskokwim I* opinion, the court further contradicted its precedents. Without invoking either the "reasonably susceptible" standard or the "clearly erroneous" standard, the court held that the evidence offered by Alaska Diversified contradicted the writing and was, therefore, barred by the parol evidence rule.[127] In *Alaska Northern*, however, the court had held that in determining whether an offered interpretation contradicted the writing, the question was one of fact if the evidence conflicted as to meaning.[128] The meaning could only be

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120. 778 P.2d 581, 583 (Alaska 1989), *cert. denied*, 493 U.S. 1022 (1990) [hereinafter *Lower Kuskokwim II*].

121. 734 P.2d 62 (Alaska 1987) [hereinafter *Lower Kuskokwim I*].

122. *Id.* at 63.

123. *Id.*

124. *Id.*

125. *Id.*

126. Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 37 (Alaska 1983), *cert. denied*, 464 U.S. 1041 (1984).

127. *Lower Kuskokwim I*, 734 P.2d at 64.

128. *Alaska Northern*, 666 P.2d at 39.

determined as a matter of law if "'the asserted meaning [is not] one to which the language of the writing, read in context, is reasonably susceptible.'"[129] The trial court in *Lower Kuskokwim I* had apparently found the contract language to be "reasonably susceptible" to the meaning asserted by Alaska Diversified, or it could not have admitted extrinsic evidence as to the issue. The court, by also not employing the "clearly erroneous" standard in overruling the trial court's findings, treated the determination of whether an asserted meaning is contradictory as a question of law.

In *Lower Kuskokwim II*, the court dismissed the claim that the Alaska parol evidence rule was dead.[130] In so doing, the court quoted extensively from the holding in *Alaska Northern*, but in its presentation of the *Alaska Northern* standards, the court portrayed the application of the parol evidence rule in Alaska in a more restrictive light. The court held that, according to *Alaska Northern*, three determinations must be made before the parol evidence rule can be applied: "(1) whether the contract is integrated, (2) what the contract means, and (3) whether the prior agreement conflicts with the integrated agreement."[131] The parol evidence rule is not applicable until the second step has been completed.[132] When the court considers the question of meaning, extrinsic evidence may always be consulted.[133]

The court further suggested that Alaska Diversified's confusion regarding the rule stemmed from the distinction between using extrinsic evidence to determine meaning and barring its use to change that meaning once it has been determined.[134] The question of meaning, including a review of extrinsic evidence to determine if there are conflicting assertions, is one of law to be determined by the court.[135] Where the court finds the evidence to conflict, the court must still decide the question of meaning unless the written language is reasonably susceptible to both meanings, in which case it becomes a question for the jury.[136]

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129. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. b (1979)).
130. *Lower Kuskokwim II*, 778 P.2d at 583.
131. *Id.*
132. *Id.* at 584.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

Although the court used virtually the same language in *Lower Kuskokwim II* as it had in *Alaska Northern*, the role of the court is far more prominent in the former's application of the parol evidence rule. This critical distinction goes well beyond a mere question of semantics. In *Alaska Northern*, the court held that meaning is a question of fact unless "'no other meaning is reasonable.'"[137] This implies that questions of meaning are presumed to be questions of fact unless it is exceedingly clear that only one meaning could ever be given to the contract terms under the circumstances. *Lower Kuskokwim II*, however, holds that "the court . . . must nonetheless decide the question of meaning except where the written language, read in context, is reasonably susceptible to both asserted meanings."[138] Contrary to *Alaska Northern*, this construction implies a presumption that the question is one of law unless it is shown that both asserted meanings are "reasonable."

In other words, under *Alaska Northern*, meaning is a question of fact unless an asserted meaning is shown to be unreasonable, whereas under *Lower Kuskokwim II*, meaning is a question of law unless two asserted meanings are shown to be reasonable. Such a shift casts the parol evidence rule in a more restrictive light. Under *Alaska Northern*, the question of meaning is more likely to be treated as a question of fact, and, consequently, the "clearly erroneous" standard is more likely to impede review of trial court decisions. By changing this standard, again without explicitly overruling prior decisions, and, indeed, by relying on the contrary holding in *Alaska Northern*, the court procured more power for itself in parol evidence cases and avoided the drawbacks of excessive applicability of the "clearly erroneous" standard.[139]

D. The Current Status of the Parol Evidence Rule in Alaska

The Alaska Supreme Court again grappled with the parol evidence rule in *Western Pioneer, Inc. v. Harbor Enterprises,*

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137. Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33, 39 (Alaska 1983) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. b (1979)), *cert. denied*, 464 U.S. 1041 (1984).

138. *Lower Kuskokwim II*, 778 P.2d at 584.

139. It is important to reiterate, however, that whether or not meaning is considered a question of law, extrinsic evidence is always admissible on questions of meaning. *Id.* Thus, this is still a liberal application of the parol evidence rule.

Inc.,[140] which chronicles the current status of the rule.[141] According to *Western Pioneer*, the parol evidence rule in Alaska is applicable when one party seeks to admit evidence which varies or contradicts an integrated contract.[142] When this occurs the three step test articulated in *Lower Kuskokwim II* is employed.[143] Whether the evidence is conflicting is a question for the court, as is the meaning of the contract.[144] If the relevant language is reasonably susceptible to two asserted meanings, however, the question becomes one of fact.[145] Extrinsic evidence is always admissible to determine integration and meaning, the first two steps in the *Lower Kuskokwim II* test.[146] Whether there is conflicting extrinsic evidence depends upon whether the asserted prior agreement is inconsistent with the written document, and inconsistency is determined according to the definition adopted in *Alaska Northern*.[147] Where the extrinsic evidence is found to be conflicting, the parol evidence rule bars its admission.

VI. CONSEQUENCES OF THE RULE'S CURRENT STATE

A. Practical Consequences

Over the past decade, the Alaska Supreme Court has greatly improved its treatment of the parol evidence rule by maintaining a higher level of consistency among its holdings and by explicitly stating the methodology by which it will evaluate cases involving the rule. Currently, the status of the rule is more clearly defined than at any other juncture in Alaska history. Some improvements,

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140. 818 P.2d 654 (Alaska 1991).

141. *Id.* at 657 n.4. Prior to *Western Pioneer*, the court had reiterated its powers of de novo review of lower court decisions in cases of contract interpretation. In Zuelsdorf v. University of Alaska, 794 P.2d 932 (Alaska 1990), the court, though not addressing the parol evidence rule, held that the interpretation of contracts presents a question of law for the court to decide, subject to de novo review by the Alaska Supreme Court. *Id.* at 933; *see also* Cox v. Progressive Casualty Ins. Co., 869 P.2d 467, 468 n.1 (Alaska 1994); Johnson v. Schaub, 867 P.2d 812, 818 n.12 (Alaska 1994). "[R]esolution of disputes regarding surrounding circumstances is for the trier of fact." *Zuelsdorf*, 794 P.2d at 933.

142. *Western Pioneer*, 818 P.2d at 657 n.4.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*; *see supra* note 105 and accompanying text.

however, could be made that would further clarify the rule for practitioners and lower courts.

To develop a more consistent body of case law, the court should either follow its precedent strictly or explicitly alter or overrule that precedent when it wishes to change the state of the law. As evidenced by its furtive move to the Corbin approach, and again by its *Lower Kuskokwim II* opinion, the Alaska Supreme Court has preferred to "bend" its prior decisions, recharacterizing those holdings as supporting the court's current position, rather than expressly overruling prior holdings. Although bending precedent to support a current decision makes the court appear to be more consistent, this approach undermines the importance of precedent in parol evidence jurisprudence and engenders confusion, leaving practitioners and the lower courts unclear as to which cases they can or should rely upon.

Although the Alaska Supreme Court was free to overrule earlier precedent and thereby adjust the state of the law to conform with current theory,[148] its parol evidence decisions created confusion by failing to inform the legal community that such a change was being made and by not articulating the reasons behind the change. The resulting inconsistency is especially problematic in a jurisdiction such as Alaska where years may elapse between reported parol evidence cases, creating few opportunities for the court to clarify its position. To avoid such difficulty, it is of paramount importance that the court be clear and concise when it makes theoretical changes, particularly where the parol evidence rule is at issue. Although an attorney can never be certain whether a particular piece of extrinsic evidence will be held to be admissible at trial, it is essential that practitioners know whether the court will be restrictive or liberal in its enforcement of the rule. Familiarity with the theory employed by the court will enable practitioners to

148. *See* Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1176 (Alaska 1993) ("[W]e will overrule a prior decision only when 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent' . . . ." (quoting State v. Dunlop, 721 P.2d 604, 610 (Alaska 1986) (quoting State v. Souter, 606 P.2d 399, 400 (Alaska 1980)))); Dimick v. Schiedt, 293 U.S. 474, 487 (1935) ("The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions." (citing Funk v. United States, 290 U.S. 371 (1933))).

more accurately predict which evidence is likely to be admitted at trial, aiding them in devising effective trial strategies.

B. Theoretical Consequences

Several of the difficulties that arose after the *Alaska Northern* opinion could have been avoided had the court never abandoned the traditional approach. The more restrictive, traditional approach offers two advantages over its liberal counterpart. First, where courts are willing to allow virtually any extrinsic evidence to be admitted at trial, as under the liberal approach, the courts expose themselves to potential fraud, as the parties can attempt to attach any "reasonable" meaning to the contract at trial. Under the traditional approach, however, the parties are more likely to be bound by the specific terms of the contract, thus limiting the opportunity for parties to re-evaluate their intentions in light of changed circumstances after a contract has been formed. The more restrictive approach encourages parties to write "better" contracts, as they will likely be bound by those terms.[149] Secondly, the traditional approach promotes judicial economy.[150] The more extrinsic evidence that is admitted at trial, the more time the court will spend sifting through such evidence to determine the meaning of the contract terms. Where the restrictive approach is employed, terms are more likely to be found to have definite meaning, and such time-consuming arguments are avoided.

In the Alaska context, the problems that evolved from the expanded application of the "clearly erroneous" standard would not

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149. Proponents of the liberal approach, on the other hand, argue that the traditional approach is more conducive to fraud because it fails to admit evidence of surrounding circumstances that would more accurately depict the intent of the parties. Thus, the parties may be bound by an agreement neither intended. *See, e.g.*, Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 173 (1965). This concern is partially obviated by the fact that, under the traditional approach, such surrounding circumstances are taken into consideration when the trial judge initially considers whether ambiguity exists. Such concerns can further be alleviated by better drafting of the written contract which makes the parties' intentions clear. The possibilities of fraud invited by the liberal approach cannot be so easily eliminated. Where parties are allowed to offer virtually any evidence regarding a "reasonable" meaning, an attempted fraud can be avoided only where the fact finder can correctly determine which party is misrepresenting the facts.

150. *See* Wilson Arlington Co. v. Prudential Ins. Co. of Am., 912 F.2d 366, 370 (9th Cir. 1990); Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988).

have occurred under the two-tiered approach adopted in *National Bank*.[151] Under that approach, before extrinsic evidence could be admitted to determine meaning, the court was required to find the language of the contract to be ambiguous in light of the surrounding circumstances. Under this approach, interpretation is only a non-reviewable question of fact when the reviewing court agrees that ambiguity exists, not simply when conflicting evidence has been admitted at trial. Thus, the higher courts retain tighter control of the status of the rule and are able to ensure its consistent application.

VII. CONCLUSION

Without regard to whether the current Alaska Supreme Court prefers the traditional or liberal approach, it should, at the next opportunity, issue an exhaustive opinion on the state of the parol evidence rule in Alaska similar in form to that of Arizona's *Taylor* decision.[152] The opinion should begin with a theoretical discussion outlining why the court prefers one approach over another. The Alaska Supreme Court has never before discussed its theoretical position or its reasons for a particular preference. The opinion should also detail exactly how the rule is to be applied in Alaska. At this point, the court should cite relevant precedent and disapprove of those cases which have been found to be in conflict with the current state of the rule, rather than attempting to manipulate them to fit the current position. Such a discussion would be immensely useful to practitioners who wish to prepare effective parol evidence arguments before the Alaska courts. Once such an opinion has been issued, its theoretical underpinnings should not be strayed from in subsequent cases. Only by such a straightforward approach can the confusion surrounding the parol evidence rule in Alaska, fostered by decades of inconsistent opinions and furtive changes in the law, finally be put to rest.

Leonard Marinaccio, III

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151. 546 P.2d 579 (Alaska 1976).

152. Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134 (Ariz. 1993); *see supra* notes 63-83 and accompanying text.